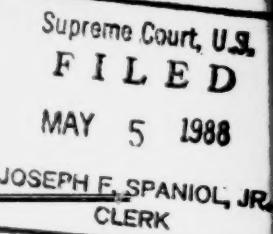


87-1827



In The
Supreme Court of the United States
October Term, 1988

PETER LODUCA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. May the Government, fully aware of its duty and obligation to protect the Constitutional rights of all citizens and fully cognizant that no basis existed in its files and reports under its control, be instrumental in introducing supporting affidavits for pretextual allegations that an individual is a "known narcotics trafficker" in order to attempt to legitimize a blatant violation of Fourth Amendment's rights against unreasonable searches and seizures, without violating the Fifth Amendment to the Constitution i.e., Due Process and this Court's principles stated in *Brady v. U.S.*, 373 U.S. 83 (1963) and *U.S. v. Agurs*, 427 U.S. 97 (1976)?

2. Did Petitioner obtain effective assistance of Counsel, when the latter

- (a) Incorrectly informed petitioner that his plea of guilty could be withdrawn
- (b) Notified Court at guilty plea that petitioner, with a Second Grade education from Italy and no additional education in the United States, who could not read or write English, had no defense to Code Section 7206(1) violation i.e., subscribing income tax return under penalty of perjury knowing same to be false
- (c) Did not see or seek any documents that Government relied on
- (d) Made no motions, specifically to suppress information obtained from Fourth Amendment violations, which represented the origin for the investigation's exploitation of illegal police action and became the "but for" source of Government's case.

or were LoDuca's rights under the Sixth Amendment to the Constitution to effective assistance of counsel violated since the aforementioned reveals that the range of competence demanded of attorneys in criminal cases was not met?

LIST OF PARTIES

Petitioner, PETER LODUCA, was the defendant in the United States District Court and appealed to the Second Circuit United States Court of Appeals.

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PETER LODUCA,

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vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Peter LoDuca prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Second Circuit decided March 9, 1988 (Appendix A) *infra*, which affirmed the judgment of the United States District Court for the Eastern District of New York (I. Leo Glasser, J.) denying a motion to withdraw plea of guilty to a charge of income tax violation pursuant to 26 U.S.C. §7206(1).

THE OPINION OF THE COURT BELOW

The opinion of the Court below, namely the United States Court of Appeals for the Second Circuit, affirming the decision and judgment, is set forth in Appendix A, *infra* as aforesaid.

JURISDICTION

The order of the judgment of the United States Court of Appeals for the Second Circuit, the Court below is dated March 9, 1988. Jurisdiction of this Court is invoked, made and conferred under 28 U.S. Code §1254(1).

THE PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution

Fifth Amendment to the Constitution

Sixth Amendment to the Constitution

Title 26 U.S. Code Section 7206(1)

STATEMENT OF THE CASE

Government files revealed that on October 21, 1983, solely due to the petitioner receiving and placing a brown paper bag in the trunk of his car on the service road of the Whitestone Expressway at the intersection of Linden Place, Drug Enforcement agents (DEA) followed and stopped LoDuca after he had driven a short distance. The bag was received from one Salvatore Finazzo, subsequently pretextually deemed a "known narcotics trafficker." A search of the trunk revealed that the brown bag contained \$100,000.00, which LoDuca upon being questioned responded that it represented gambling winnings.

The bag of money and LoDuca were transported to the 109th Precinct, where the money was counted, seized and a receipt given to LoDuca. The latter was then returned to his auto and the money vouchered at DEA Regional Office, 555 West 57th Street, New York, New York. At a subsequent date the money was returned to LoDuca.

Solely as a result of this confrontation, Internal Revenue Service Agents since that time conducted an "intensive investigation" which focused upon LoDuca's business and real estate holdings, which revealed various alleged omissions of rental and interest income for the years 1980 to 1982. But for this stop and arrest, without "reasonable suspicion" or "probable cause" that some illegal activity occurred, and its discovery of monies, the Internal Revenue Service had no basis to initiate an investigation of LoDuca. Papers submitted all pointedly reveal that this was the triggering device for the investigation.

Subsequently as a result of this investigation, solely triggered by the aforementioned facts, two indictments, originally violation of Title 26 U.S. Code §7206(1) for the year 1980 and superseding charging violation of conspiracy and income tax evasion, Title 18 U.S. Code §371 and Title 26 U.S. Code §7206(1), respectively for the years 1980 to 1982 were handed down.

To the initial indictment, a plea of Not Guilty was entered by the undersigned, who was at that time retained. Subsequently, William I. Shore, Esq., represented the defendant and plead him guilty to a one count violation of Title 26 Section 7206(1).

Violation of Title 26 U.S. Code §7206(1) requires:

- (a) Specific intent to make a material false statement on a tax return and
- (b) Subscribing tax return under penalties of perjury (i.e., knowingly)

At the plea transcript on July 1, 1987, William Shore, Esq., attorney for defendant-petitioner stated he knew of

no reason why the defendant-petitioner should not plead guilty. At that hearing, the transcript reveals at p. 11, Judge Glasser stated:

With respect to this plea agreement, I see no reason why I shouldn't approve it but I will defer that until I have seen the pre-sentence report and if for any reason I reject this agreement, I will permit Mr. LoDuca to withdraw his plea of guilty he has entered this morning, is that satisfactory Mr. Shore.

William Shore submitted a written motion to withdraw guilty plea of LoDuca stating on September 17, 1987:

Your Honor, the defendant has informed me that he wishes to withdraw his plea of guilty, and I would like to so move. Your Honor previously said you would accept the plea with leave to withdraw it. I know it is kind of late but I ask leave

Court: I don't think I ever said that. I never said I would accept the plea with leave to withdraw it.

Shore: There was a statement that you had made something with respect to leave to move to withdraw it.

Court: I said in the event I do not approve of the plea agreement which was entered into.

Shore: I misunderstood.

On October 13, 1987 on a motion to withdraw plea of guilty, Shore stated that the defendant was "functionally illiterate" and that due to the fact that the Government advised him that documentary evidence existed that the defendant was literate, he advised the defendant that a viable defense did not exist. For the first time, despite the government's claim that they spent six hours detailing the evidence against LoDuca to Shore, the latter stated that he recognized, based on the documents submitted in opposition to his motion to withdraw the guilty plea, he initially recommended, that the document submitted i.e.,

Naturalization Petition, merely indicates minimal requirements of literacy. Further, that although the government did not show him any documents, Assistant U.S. Attorney Pileggi related that the government had documentary evidence of LoDuca's literacy which he assumed was a letter or something else written in English by the defendant. The Government did not controvert these facts at this hearing.

The government at a subsequent motion to withdraw plea of guilty stated:

Mr. Shore came into my office and for hours went thru documentation and obtained far more discovery than I customarily provide in criminal cases.

directly controverting what Shore related previously as to his reliance solely on Government's representation, which originally met no objection.

It should be noted that at a Fatico hearing prior to sentencing LoDuca to a three month term of incarceration, a fine of \$5,000 to be followed by a two-year-nine-month period of probation, the Court, after hearing the Government's witness pertaining to Finazzo's pretextually being "a known narcotics trafficker" shown to have no credence or basis and the direct testimony of Finazzo denying any knowledge of narcotics, obliterated any reference pertaining to narcotics from the record.

Nevertheless, the record points out that prior thereto, demonstrating a shocking disregard for the concept of due process and simple fairness, the Government was instrumental in submitting an affidavit alleging that Finazzo was a "known narcotic trafficker" although its records and files reveal that no foundation or basis existed for this allegation. "Vigilante Justice" is abhorrent to our concept

of jurisprudence whether the end product be a body dangling from the end of a rope, or a person charged with a crime as a result of lawless conduct on the part of an overzealous prosecutor. The latter indeed is reprehensible since both society and the accused are victimized by one sworn to uphold the law.

A prosecutor cannot be permitted to turn away or remain passive when information showing that patently misleading testimony was submitted to the Court, which is obvious from the record and files in these proceedings.

REASONS FOR GRANTING THE PETITION

1. Although the government is not responsible for and hence not able to prevent attorney errors that will result in reversal of a conviction or sentence, if the attorney errors are due to governmental camouflage and deceptive practices to conceal Constitutional deprivations by law enforcement officials, must due process provision of Fifth Amendment be applied in these situations?
2. The issues are important to safeguarding liberties and protections afforded by the Fourth, Fifth and Sixth Amendments to the Constitution.
3. The plea did not represent a voluntary and intelligent choice among alternative choices of actions open to defendant.
4. Based on lack of knowledge of law and investigation of facts by attorney, plea was unintelligent nor was it within standards set forth in *McMann*, 397 U.S. 759, 771 (1970).
5. To assure that the Court's promulgation and obligation via Brady material is strictly adhered to.

POINT I

WHETHER THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE WAS VIOLATED

The Government, fully aware of its duty and obligation to protect the Constitutional rights of all citizens and fully cognizant that no basis existed in its files and reports under its control, cannot be instrumental in introducing supporting affidavits for pretextual allegations that an individual is a "known narcotics trafficker" in order to attempt to legitimize a blatant violation of Fourth Amendment's rights against unreasonable searches and seizures, without violating the Fifth Amendment to the Constitution, i.e., Due Process and this Court's principles stated in *Brady v. U.S.*, 373 US 83 (1963) and *U.S. v. Agurs*, 427 U.S. 97 (1976).

The due process clause of the Fifth Amendment to the Constitution does limit what evidence a Court may consider, but it does require that a defendant be afforded the opportunity to assure that accurate and reliable information is presented and that judgment is imposed on the basis of materially true statements and accurate information.

A prosecutor's duty is to seek justice, not merely to convict. He or she is a quasi-judicial officer, who represents the people and is presumed to act impartially solely in the interests of justice and whose primary duty is to see that justice is done, and the rights of all—defendants included—are safeguarded. There is a positive obligation to see that no Constitutional violations occur.

Chief Justice Rehnquist stated in *Daniels v. Williams*, 106 S.Ct. 662 (1986) "the aim of the due process clause is to curb abusive power by the State in the form of either oppression or procedural unfairness."

It has been said that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Anti-Fascist Committee v. Mc Grath*, 341 U.S. 123, 162; 71 S.Ct.624, 643; 95 L.Ed.817 (Frankfurter, J., concurring). It embraces fundamental rights and immutable principles of justice and use of the term is but another way of saying that every person's right to life, liberty and property is to be accorded the shield of inherent and fundamental principles of justice. *Ives v. South Buffalo Railway Co.*, 201 N.Y.271, 293, 295-6. Due process of law guarantees respect for personal immunities so rooted in the tradition and conscience of our people as to be ranked as fundamental. *Snyder v. Massachusetts*, 291 U.S.97, 105; 54 S.Ct.330, 332; 78 L.Ed.674 (Cardozzo, J.). It imposes upon Courts the duty to foster that fundamental fairness essential to the very concept of justice. *People v. Leyra*, 302 N.Y.353, 364.

In the extant situation the sole triggering device for the intensive tax investigation was the exploitation of the illegal discovery of money in LoDuca's automobile based on the myth that it was received from "a known narcotic trafficker". Although not involving a confession this situation is virtually a replica of *Dunaway*, 442 U.S.200, 99 S.Ct. 2248, 60 L.Ed.2d 824. No intervening events broke the connection between the illegal seizure and the income tax investigation. To admit the results of the investigation, whose origin was the money located by illegal search and seizure would permit law enforcement officers to violate the Fourth Amendment with impunity.

The limitations of the due process clause of the Fifth Amendment come into play only when the government activity in question violates some protected right of the defendant.

Fourth Amendment

- There is no question that the stop and detention of LoDuca were not constitutionally justified.

The stopping of an automobile and detaining its occupant constitutes a seizure within the meaning of the Fourth Amendment, even though purpose of stop is limited and resulting detention quite brief. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391; 59 L.Ed.2d 660.

No articuable suspicion of criminal activity existed in the transfer of the brown paper bag, other than the pretextual allegation without a scintilla of evidence that Finazzo, who gave a brown bag to LoDuca, was a "known narcotics trafficker", for the forcible stop of petitioner's vehicle on a Queens street or the coerced search of its trunk. The prospect of police officers stopping a moving vehicle without any suspicion of wrongdoing is an intimidating and coercive situation in and of itself.

A warrantless automobile search requires both probable cause to believe that the vehicle contains contraband or other evidence subject to seizure and exigent circumstances. To justify a particular intrusion upon a citizen's constitutionally protected interests, "the police officer must be able to point to specific and articuable facts, which taken together with rational inferences from these facts warrant intrusion." *Terry*, 392 U.S. at 21.

It is clear when considering the fact that the record is barren of any evidence to deem Finazzo a "known narcotic trafficker" that solely due to one receiving a brown paper bag and placing that in his automobile trunk, that the drug enforcement agents acted unreasonably in forcibly stopping LoDuca's vehicle. After being stopped by

the team of enforcement officers and in this coercive surrounding allegedly being "requested" to open the trunk, it is clear that petitioner's liberty had been completely curtailed before any information regarding the contents of the brown bag became known. Subsequent events i.e., seizure of money and transportation to the 109th precinct, buttress this fact.

Petitioner's conduct i.e., receiving a brown paper bag and placing same in trunk of car, did not unequivocally reflect criminal purpose and by subsequent evidentiary facts, the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand was non-existent. Under the totality of circumstances in this case, no reasonable suspicion can be gleaned that the petitioner was involved in criminal activity. The scenario demonstrates innocent, lawful conduct, not a basis for a reasonable suspicion of illegal conduct especially when the false allegation as to a "known narcotics trafficker" is removed.

Insufficient basis for seizing LoDuca, money or stopping car existed. Therefore any property recovered as a result of this unreasonable and unlawful seizure must be suppressed as the fruit of that unconstitutional action by law enforcement personnel. *Wong Sun v. U.S.*, 371 U.S. 417. This solely being the triggering device for the intensive investigation by the Internal Revenue Service, it must be deemed that "but for" the illegal action, no investigation by Internal Revenue Service would have been initiated. As was related during argument in the United States Court of Appeals by Justice Pratt, "What interest would the Internal Revenue Service have solely in a brown paper bag?"

As was stated in *Dunaway v. New York*, 99 S.Ct. at 2259 (1979) "following Wong Sun, the Court eschewed any per se or 'but for' rule, and identified the relevant inquiry as to 'whether Brown's statements were obtained by exploitation of the illegality of the arrest.'" 422 U.S. at 600, 95 S.Ct. at 2260. When there is a close casual connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future but also use of the evidence is more likely to compromise the integrity of the Courts.

Attenuation under *Gissendanner v. Wainwright*, 482 F.2d 1293, 1296-7 (5th Cir. 1973) is inapplicable since therein it was a third party's constitutional rights that were violated and the defendant was deemed not to have standing and in *U.S. v. DiTomasso*, 817 F.2d 201 (2d Cir., 1987), no basis existed to support a motion to suppress in the record.

There can be no doubt that the actions herein require that the evidence should have been quarantined to prevent further spread of any poisonous taint i.e., exploitation of the illegality.

Brady Material

The rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194; 10 L.Ed.2d 215 (1967) is as follows: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." The prosecutor is charged with knowledge of the significance of evidence in his file even if he has actually overlooked it. *U.S. v. Agurs*, 427 U.S. at 110, 96 S.Ct. at 2400. Further the rule

in *Brady* has been expanded to cover situations in which no request has been made by the defendant for items of exculpatory evidence. Rather in some cases certain evidence may be of such probative value as to require the prosecutor to reveal it to the defendant absent any demand for it.

It is conceded that the record indicates that Shore made no motions or requests, except that the government recommend probation. However, based on *Agurs, supra*, the fact that no basis existed for deeming Finazzo, "a known narcotics trafficker" was material to whether a plea would be taken there can be no doubt that this information would have alerted any responsible attorney as to the violations of petitioner's Fourth Amendment rights and would call for more than a possible "boilerplate" motion.

Although not requested, due to its constitutional underpinnings, government counsel was under a duty to give notification of the non-existence of the claim and the lack of any basis therefor, rather than pursue a course to attempt to mislead the Court and defense counsel. As was stated in *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3384 "evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different" which is vividly portrayed based on the facts herein.

Sanctions

Government counsel and agents evidently with impunity can submit or make any conclusory remarks without sanctions.

In *Briscoe v. LaHue*, 460 U.S. 325 (1986) this Court held that police officers are absolutely immune from liability under 42 U.S.C. 1983 for testifying falsely at trial. The Ninth Circuit held that a police officer who gives perjurious testimony during adversarial pre-trial proceedings is entitled to absolute immunity. *Holt v. Castaneda*, 832 F.2d 123 (1987). In *Malley v. Briggs*, 475 U.S. 335 (1986) the Court held that a police officer who made false statements to obtain an arrest warrant is entitled to only qualified immunity.

To the credit of the government in this case, no testimony was asserted as to any alleged grounds for deeming Finazzo "a known narcotic trafficker". However, the camouflage to mislead defense counsel who asserted he did not see any of the records in this case succeeded despite *Brady* and *Agurs*, *supra* and other rights granted by the Fourth and Fifth Amendments to the Constitution.

The Court would be paying mere lip service to the principle of due process if it sanctioned this prosecution in face of the revelations in this record.

POINT II

PETITIONER DID NOT OBTAIN EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION

A defendant is entitled to the effective assistance of counsel. *Evitts v. Lacey*, 469 U.S. 387 (1985). The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) established a two-part test for ineffective assistance of trial counsel - that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability of a different result in the proceedings but for counsel's errors.

Pre-trial discovery procedure evinces a determination that the trial of a criminal charge should not be a sporting event where each side remains ignorant of the facts in the hands of the adversary until events unfold at trial and enables a defendant to make a more informed plea decision, minimizes tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt and innocence.

The criteria for prosecutorial propriety is found in the classical verbiage of *Berger v. U.S.*, 295 U.S. 78, 88-89 (1935).

- "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite

sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

It becomes apparent that the U.S. Attorney has an affirmative duty to make diligent good faith efforts to ascertain the existence, if any, of constitutional deprivations. If any is found to exist, to reveal same to the Court and defense counsel.

Counsel for petitioner herein based on the record, unequivocally demonstrates a complete lack of investigation or preparation whatsoever on the basic defenses available, constitutional deprivations, illiteracy, failure to look at or recognize government's discovery, his sole efforts being an attempt to obtain the government's consent to recommending probation with regard to a guilty plea.

Although assertedly aware that LoDuca's primary defense was illiteracy, i.e., his inability to read or write English except for his name, no effort was ever made to attempt to ascertain the basis for the government's claim of documentary evidence that petitioner was literate. He assumed that the government had a letter or something else written in English by LoDuca. Only at the hearing on October 13, 1987, based on the government's documents submitted in opposition to his motion to withdraw guilty plea, did Shore become aware that it was based on a naturalization petition, the latter he deemed merely indicative of minimal requirements of literacy.

Counsel's comprehension of the guilty plea was so convoluted that he on September 17, 1987, again in a motion to withdraw plea of guilty, stated that the Court had accepted the plea with leave to withdraw it until corrected by the Court. This original interpretation was transmitted to the defendant.

It should be noted that this record unequivocally demonstrates that Shore took no time to review and prepare both the law and the facts relevant to the defense and evidently is unfamiliar with or able to employ at trial basic principles of criminal law and procedure. In the extant situation, his sole purpose, plea bargaining, being indifferent as to the guilt or innocence of his client.

It must be concluded that based on the cumulative errors particularized above, on basic points essential to any investigation or representation, mandates the conclusion that petitioner was denied his right to effective assistance of counsel and was prejudiced by erroneous advice. Original counsel, upon being clobbered recognized his erroneous advice. But for counsels unprofessional errors, the result of this proceeding could not have withstood constitutional challenges and/or the evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A—ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 9th day of March, one thousand nine hundred and eighty-eight.

PRESENT:

HON. WILFRED FEINBERG, Chief Judge
HON. GEORGE C. PRATT, Circuit Judge
HON. PETER C. DORSEY, District Judge, for the
District of Connecticut, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER LO DUCA,

Appellant.

No. 87-1483

This case came on to be heard on a transcript of the record and was argued.

ON CONSIDERATION WHEREOF, it is now ordered that the judgment appealed from be and hereby is AFFIRMED.

Appellant Peter Lo Duca appeals from a judgment of the United States District Court for the Eastern District of New York (I. Leo Glasser Judge), denying his motion to withdraw his guilty plea to a charge of understating income in violation of 26 U.S.C. §7206(1). Lo Duca claims

he was denied effective assistance of counsel based on a variety of purported failures by trial counsel, including a failure to move to suppress evidence and correctly to advise him with regard to the consequences of his plea.

None of Lo Duca's arguments has merit. Any suppression motion with regard to evidence seized at the time of Lo Duca's arrest would have been irrelevant at best, since the government had no intention of introducing the evidence at trial, a fact known to defense counsel prior to acceptance of the plea agreement. Moreover, the failure to move to suppress the evidence was not raised in the motion below and therefore is not properly before us.

As to the claim that Lo Duca did not understand the consequences of his plea because of his limited facility in English and the failure of counsel to explain the ramifications, the record amply supports the conclusion that Lo Duca—an extremely successful and sophisticated businessman—did, in fact, understand English sufficiently well to grasp the plea agreement, as well as the income statement on which he understated his income. The plea allocution was conducted in conformity with rule 11, and therein Lo Duca made clear that he understood what he was doing and the potential consequences.

We have considered the remaining arguments raised by Lo Duca and find them to be without merit.

s/ Wilfred Feinberg
Wilfred Feinberg, U.S.C.J.

s/ George C. Pratt
George C. Pratt, U.S.C.J.

s/ Peter C. Dorsey
Peter C. Dorsey, U.S.D.J.

3a

*N.B. THIS SUMMARY ORDER WILL NOT BE
PUBLISHED IN THE FEDERAL REPORTER AND
SHOULD NOT BE CITED OR OTHERWISE RELIED
UPON IN UNRELATED CASES BEFORE THIS OR
ANY OTHER COURT.*